

PUBLIC VERSION

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of)	
)	
WORLDCALL INTERCONNECT, INC.)	
a/k/a EVOLVE BROADBAND,)	
Complainant)	File No. EB-14-MD-011
)	
v.)	
)	
AT&T MOBILITY LLC)	
Defendant)	

SUPPLEMENTAL DECLARATION OF MARTYN ROETTER

August 10, 2015

1 I. Verification

2 I, Martyn Roetter, hereby declare under penalty of perjury, that I have personal knowledge
3 that the facts set forth below are true and accurate. My qualifications are as stated in my
4 original Declaration submitted in this proceeding on November 6, 2014 and in Appendix B
5 of my Reply Declaration on November 21, 2014. Since that time I have continued to analyze
6 developments in the market structure and competitive dynamics of the
7 telecommunications sector and their implications for consumers and public policy and
8 have submitted more filings to the Commission during 2015.¹

9 The factual assertions made and conclusions expressed herein are based on my experience
10 in the industry, my analysis of public information regarding prices and terms and
11 conditions for roaming, my understanding of current and contemplated service offerings
12 and the particular situation facing smaller and/or rural providers with relatively small
13 geographic areas where they have fully-licensed spectral authorizations but seek to
14 provide services on a broader basis. I rely on some publicly available materials not yet in
15 the record of this case. Those materials are attached to this Supplemental Declaration as
16 Exhibits.

17 II. Background and Summary

18 A. I have reviewed the "Best and Final Offer" data roaming agreements
19 submitted by AT&T Mobility ("AT&T") and Worldcall Interconnect, Inc. ("WCX") on July 15,
20 2015. I have also reviewed the Supplemental Declarations of Dr. Jonathan Orszag (Orszag
21 Suppl. Dec.") and Gram Meadors ("Meadors Suppl. Dec.") on behalf of AT&T. I will provide a

¹ Roetter Suppl. Decl. Appendix B contains links to my more recent Commission filings.

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1 response to the two AT&T witness declarations and the opinions and assertions stated
2 therein regarding the parties' respective BAFOs.

3 B. I will also provide updated information regarding industry developments
4 that have occurred in the dynamic mobile communications market since my last
5 Declarations.

6 C. My factual and expert opinions support the legal and policy positions
7 espoused by WCX and WCX's BAFO terms, conditions and prices, which in my opinion are
8 just, reasonable, nondiscriminatory and commercially reasonable and best resemble the
9 outcome that would obtain between two willing but still self-interested business actors
10 that are negotiating in good faith over fair, reasonable and compensatory roaming terms.
11 WCX's terms, conditions and prices are also more consistent with, and better implement
12 the Commission's policies and goals with regard to roaming so that wireless customers can
13 receive quality services, at fair prices and have seamless nationwide connectivity while still
14 having sufficient incentives to expand their own network coverage capabilities.

15 D. On the other hand:

16 1. AT&T's roaming terms, conditions and prices are not just and
17 reasonable with regard to WCX's ability to secure roaming for WCX's "interconnected
18 services" under the Commission's "automatic roaming" rule as it existed prior to
19 amendment in the *Open Internet Order*.²

20 2. AT&T's roaming terms, conditions and prices are not commercially
21 reasonable with regard to roaming for WCX's "commercial mobile data services" as the rule
22 existed prior to amendment in the *Open Internet Order*.

23 3. Regardless of the legal test that applies to any specific WCX service
24 that requires roaming, AT&T's terms and conditions impose unreasonable and unjustified
25 limitations to the scope of roaming that is allowed. The restrictions and limitations stem in
26 large part from AT&T's position on the type of "Network" WCX's services can use in order
27 to qualify for "Authorized Roamer" status but they are also unreasonable for WCX's CMA-
28 based customers as well.

29 a. First, AT&T's terms would deny roaming to WCX wireless
30 customers that are primarily serviced using WCX network connectivity methods other than
31 WCX's fully-licensed 700 MHz spectrum and do not reside within the CMA where WCX has
32 the license. A WCX customer that primarily uses Wi-Fi offload based connectivity or
33 Citizens' Broadband Radio Service facilities or relies on a mixture of Wi-Fi, Citizens
34 Broadband and roaming supplied by carriers other than AT&T for basic connectivity, and
35 does not reside within WCX's 700 MHz spectrum fully-licensed CMA, is ineligible for

² *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015). The Commission changed several definitions relating to CMRS service. Wireless broadband internet access is now an "interconnected service" and common carrier, and is therefore a CMRS service. For purposes of this case, however, WCX's case is being handled as if there was no change because the Commission decided to delay implementation of those changes in the roaming context. That means the old rules and definitions, including the automatic roaming rule (20.12(d)) applicable to interconnected services under the old approach and the data roaming rule (20.12(e)) applicable to commercial mobile data service (wireless broadband Internet access) still apply to this proceeding.

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1 roaming under AT&T's terms. AT&T's proposals would materially reduce WCX's incentive
2 and ability to expand its own network coverage capabilities on a technology-neutral basis.
3 They would frustrate WCX's efforts to minimize the need to rely on AT&T-provided
4 roaming. This is inconsistent with the Commission's efforts to "promote significant
5 investment in facilities-based broadband networks throughout the country" because "with
6 the added investment and deployment of broadband services by multiple providers,
7 additional benefits will result from increased competition."³ Similarly, AT&T's proposals
8 are inconsistent with the Commission's efforts to "increase consumers' access to seamless
9 nationwide mobile services, wherever and whenever they choose, and to promote
10 investment, innovation, and competition in mobile wireless services" by "encourage[ing]
11 carriers of all sizes to reach reasonable commercial roaming agreements, while also
12 encouraging these carriers to continue investing in the coverage and capacity of their
13 networks."⁴

14 b. Second, AT&T's proposed numeric limitations, in terms of the
15 total amount of roaming that is allowed in relation to usage provided by WCX's fully-
16 licensed 700 MHz is far too low. This numeric limit is based only on usage through and
17 within WCX's fully-licensed 700 MHz CMA footprint, even though WCX will have other
18 radio access network capabilities that can and will be used, thereby reducing WCX's need
19 for roaming on AT&T's network. It is also too low for the rural users residing in WCX's
20 fully-licensed CMA because rural users typically require more roaming than do urban
21 users. I previously pointed out (Roetter Decl. p. 44) the significant amount of time that
22 customers residing in WCX's licensed spectrum area spend outside this rural area.

23 4. AT&T's proposed roaming prices are not just and reasonable for
24 automatic roaming or commercially reasonable for commercial mobile data service
25 roaming. They are excessive and do not reflect a price that would be reached between two
26 willing but still self-interested business actors that are negotiating in good faith over a fair
27 price for roaming.

28 E. The principal assertions made and the core arguments presented in the
29 Orszag and Meadors Supplemental Declarations are largely illegitimate, unfounded, and in
30 some cases irrelevant for the purposes of determining whether roaming terms are just and
31 reasonable or commercially reasonable. There are internal inconsistencies or conflicts
32 between some of these arguments. More importantly, the arguments and resulting terms
33 are intrinsically anti-competitive, and innovation-hostile. Finally, AT&T's fundamental
34 positions are inconsistent with the Commission's policy and legal rationales that underlie
35 the roaming rules.

36 III. Analysis

37 A. WCX BAFO.

38 1. The WCX roaming proposal provides reasonable compensation to
39 AT&T for providing connectivity to WCX roamers, and has reasonable limitations that still

³ See *Data Roaming Order* ¶¶30, 31.

⁴ See *Automatic Roaming Reconsideration Order* ¶1.

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1 provide incentives for WCX to expand and grow its own network capabilities through
2 construction or negotiated access to third party networks.

3 2. The simple truth, however, is that WCX could never replicate AT&T's
4 nationwide footprint through construction or acquisition, or even negotiated access to
5 third party networks. There are and will always be some places where AT&T's radio access
6 network is the only acceptable connectivity solution. WCX's terms prohibit WCX from
7 "marketing" to customers in those places, but WCX's customers will still need connectivity
8 when they "roam" from their primary service location from which they receive service
9 using WCX's owned or commercially obtained third party network capabilities. WCX's
10 terms provide for reasonable roaming when AT&T's radio access network is the only
11 acceptable connectivity solution, but also ensure that WCX will not primarily rely on
12 AT&T's radio access network to provide service. WCX's network will, except for
13 unavoidable incidental situations, always be the primary source of service and access.

14 3. WCX's terms will allow WCX to innovate in ways that will benefit its
15 customers and improve its operations and contribute to society because WCX will be able
16 to expand its innovative services to serve a nationwide market, support seamless
17 connectivity and invest in additional broadband network capabilities. These innovations
18 include but are not limited to those aimed at emerging market opportunities that AT&T
19 itself is aggressively pursuing.⁵

20 4. WCX has made good faith efforts to reach compromises with AT&T by
21 adjusting its earlier proposed roaming terms and conditions to reflect AT&T's basic
22 framework and to use terms and conditions which AT&T has already agreed with other
23 carriers. WCX materially reduced the amount of permitted volume of roaming usage of its
24 customers on AT&T's network. WCX also raised its offered prices to match those WCX
25 reached through negotiations with another nationwide carrier on an arms-length,
26 commercial basis. WCX has also announced plans (WCX BAFO pp.4-5) that will in practice
27 limit the volume of usage of AT&T's network by its roaming customers, in order to reassure
28 AT&T that this traffic will not potentially impose undesirable burdens on AT&T's network,
29 even though those perceived burdens are not realistically present under the specific
30 circumstances at hand.

31 5. WCX's proposed prices are just and reasonable and commercially
32 reasonable. They reflect a price that was negotiated between two willing but still self-
33 interested businesses. AT&T's prices, on the other hand, are wholly indicative of an
34 unwilling and hostile compelled partner whose primary motivations are to restrict and
35 limit roaming, inhibit full competition and prevent smaller, regional players from growing
36 into nationwide providers that might threaten AT&T's business model and its hegemony
37 over wireless services and pricing.

38 B. AT&T's BAFO.

39 1. WCX would be effectively excluded from providing innovative and
40 nationwide services under the terms and conditions of the AT&T roaming offer. WCX
41 would be limited to providing legacy and more traditional "voice" and "data" services to

⁵ See attached Exhibit 1: AT&T M2M Snapshot

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1 only those who reside in WCX's 700 MHz CMA, and when those customers roam WCX
2 would suffer high costs and competitive handicaps due to AT&T's prices and usage
3 limitations.

4 2. The foreseeable and inevitable consequences of WCX accepting the
5 terms and conditions included in AT&T's BAFO would be harmful to competition and
6 innovation in the US mobile market, fatal to the legitimate interests of WCX and
7 detrimental to WCX's existing and potential customers. AT&T's terms, conditions and
8 prices are not consistent with the outcome of good faith negotiations under the auspices of
9 the FCC's roaming rules nor do they properly meet the Commission's objectives or achieve
10 the Commission's stated policies.

11 C. Analysis of Orszag and Meadors Supplemental Declarations.

12 1. Dr. Orszag rejects WCX's efforts at compromise (Orszag Suppl. Decl.
13 paras. 58-59), and without any credible justification argues that WCX's plans and proposals
14 are illegitimate because they allegedly more resemble "resale" than they do "roaming."
15 (Orszag Suppl. Decl. para. 61). Dr. Orszag reaches this conclusion, however, only because he
16 entirely discounts and ignores the fact that WCX will be the primary network service
17 provider in all circumstances since WCX will be supporting connectivity on its own
18 network facilities or obtaining network access through third party commercial
19 arrangements. Dr. Orszag contends that the only "legitimate" network WCX can have is that
20 which uses expensive and hard-to-come by fully-licensed spectrum, and roaming should be
21 available only to WCX customers that receive service from fully-licensed spectrum in WCX's
22 "licensed home area." All WCX customers that receive primary service from alternative
23 network capabilities and access should, according to Dr. Orszag, be entirely discounted and
24 ignored and they should be precluded from any opportunity to have roaming capabilities
25 on AT&T's network merely because they do not "reside" within the geographic area
26 comprising WCX's fully-licensed 700 MHz CMA.

27 2. Dr. Orszag concludes that roaming terms that blatantly restrict WCX's
28 freedom to innovate and provide a seamless nationwide service, prevent WCX from fully
29 competing in the wireless market, inhibit WCX's incentive and ability to build or obtain
30 nationwide network capabilities and prevent WCX customers that receive primary service
31 through alternative network capabilities and access from being able to roam at all are
32 commercially reasonable and somehow consistent with the Commission's roaming
33 purposes and policies. I respectfully disagree.

34 3. AT&T's intransigent opposition to legitimate competitive initiatives
35 and innovation from WCX is demonstrated by its rejection as invalid for consideration in
36 the roaming context of WCX's planned use of Wi-Fi hot spots, other parties' licensed
37 networks and/or Citizens Broadband Radio facilities it may construct, even though WCX
38 customers' usage of these alternative means of connection will mean that WCX will not
39 need to use AT&T's radio access network when WCX's customer can achieve connectivity
40 through these technologies. AT&T insists that WCX must limit roaming on AT&T's network.
41 But AT&T also argues that WCX's successful efforts to find ways to not roam on AT&T's
42 networks must be ignored and functionally prohibited as well, even though these efforts

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1 will directly ensure that WCX and its users do not use more roaming on AT&T's network
2 than is appropriate.

3 4. Dr. Orszag objects to innovative solutions proposed by WCX that will
4 alleviate some of the concerns he has expressed about the potential harm caused to AT&T
5 by the roaming services AT&T provides to WCX. These solutions are legitimate activities
6 for a mobile operator, and if AT&T were negotiating in good faith and not introducing
7 inconsistent objections it would acknowledge that they also represent good faith efforts by
8 WCX to alleviate AT&T's stated concerns about the potentially adverse (even though this is
9 a far fetched scenario, it has been raised by AT&T and Dr. Orszag) impact of WCX's roaming
10 traffic on AT&T.

11 5. Dr. Orszag's initial Declaration concluded that WCX is not wholly
12 dependent on AT&T for roaming, and should actively seek other roaming partners. (Orszag
13 Decl. para. 10, 20, 23, 42-43, 45-47). Prise dedicated almost his entire presentation to the
14 same topic. (Prise Decl. para. 2-19) Orszag also emphasized the goal (Orszag Decl. paras. 13
15 and 20) and desirability of ensuring that the conditions for roaming are not so favorable
16 that they discourage investment in network facilities by the requesting provider. Yet he
17 now regards (Suppl. Decl. Paras. 58-59) WCX's planned investment in Wi-Fi hot spots and
18 Citizens Broadband Radio facilities as falling outside the scope of a roaming agreement, and
19 claims that users served by those networks should not have any right to roam on AT&T's
20 network when WCX's own network is not available. His Suppl. Decl. para. 58 rejects the use
21 of a third party's network as an additional means for providing service to WCX's customers
22 outside WCX's licensed spectrum area even though his original Declaration heavily relied
23 on this very option as a reason for contending WCX did not "need" roaming from AT&T at
24 all. Orszag criticized WCX for wanting to roam on AT&T's network, but now goes to great
25 ends to criticize, discount and ultimately prohibit WCX from finding ways to not roam on
26 AT&T's network. One can only conclude that Orszag, like AT&T, believes that WCX should
27 be precluded from building, leasing or roaming and, ultimately, the best outcome is for
28 WCX to go out of business and entirely exit the market.

29 6. In para. 59 Dr. Orszag makes the extraordinary statement, "*WCX's*
30 *proposed definition extends the scope of the roaming agreement beyond what is necessary to*
31 *supplement the mobile wireless services offered by WCX when its subscribers are outside*
32 *WCX's home area.*" This statement can only be read to mean that AT&T thinks WCX should
33 be restricted to using only AT&T's network (and barred from using third parties, even
34 though the prior testimony said that was what WCX could and should do) for service
35 provision outside of WCX's licensed home area, and WCX should be prevented from making
36 network investment in deployment of anything other than costly and scarce fully-licensed
37 spectrum. Indeed, it basically suggests that WCX should be prohibited from expanding
38 primary service provision outside of WCX's licensed home area CMA. These restrictions, of
39 course, would be direct geographic barriers to entry outside of WCX's licensed home area,
40 and *prima facie* unjust, unreasonable and commercially unreasonable under *Data Roaming*
41 *Order* ¶85, which specifically holds that "conduct that unreasonably restrains trade,
42 however, is not commercially reasonable." But Dr. Orszag is merely trying to rationalize the
43 direct results that flow directly from AT&T's BAFO terms. Those terms are, without any
44 doubt, fully intended to be and create insurmountable restraints of trade because they tie

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1 WCX to service only within one relatively small geographic area in rural Texas. WCX is
2 functionally precluded from expanding outside the CMA, and is then functionally required
3 to obtain roaming from AT&T only, on massively adhesive terms.

4 7. Dr. Orszag's original declaration repeatedly said that WCX could and
5 should secure alternative spectrum inputs, including roaming from other carriers rather
6 than AT&T. Orszag Supp. Decl. para 59 is entirely inconsistent because it claims WCX
7 should get no credit for doing exactly that. But even worse, under AT&T's BAFO WCX will
8 have to secure and meet all of WCX's roaming needs of whatever kind only through AT&T
9 and all within the restrictions on usage that AT&T demands.⁶ One has to wonder why AT&T
10 on the one hand wants to minimize roaming on its network but on the other hand tries so
11 hard to prohibit every alternative to roaming on AT&T's network. I can only conclude that
12 the purpose is to establish a position to limit WCX's abilities to provide service and
13 innovate both within and without its licensed home area, so WCX will only do what AT&T
14 considers is acceptable for AT&T's purposes, and WCX cannot develop and implement
15 innovative solutions of its own that will generate value for its customers and improve its
16 operations. There is no rational justification for opposing WCX's efforts to limit its
17 dependence on roaming because it has its own network or has access to third party
18 networks, or for not giving credit for WCX's efforts to limit its need for roaming on AT&T's
19 network. This is especially unreasonable since WCX's efforts will benefit WCX's customers,
20 increase facilities-based competition and allow for innovation.

21 8. Customers' use of Wi-Fi hot spots (to take one example) is an
22 increasingly important element in the services offered to and the actual usage of the
23 customers of mobile operators, including their access outside an operator's licensed
24 spectrum areas.⁷ Furthermore as noted the availability of several means of connectivity to
25 WCX's customers, wherever they are, will reduce the potential load of WCX's roamers on
26 AT&T's network, which elsewhere Dr. Orszag complains about (Orszag Suppl. Decl. para.
27 38) as creating (albeit with no evidence to back up this concern) a potentially harmful
28 burden for AT&T.

29 9. The general tenor of the Meadors and Orszag Supplemental
30 Declarations is consistent with their previous Declarations in reflecting a unilateral
31 arrogant assumption that AT&T's retail business model choices – including AT&T's
32 decisions regarding spectral use, device functionality, application capabilities and
33 authorizations and the future course of the emerging M2M market – must be mirrored by
34 any other provider that seeks roaming capabilities on AT&T's radio access network. AT&T
35 is one of the only two providers with almost ubiquitous nationwide coverage and is

⁶ [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL]

⁷ See attached Exhibit 2: WiFiOffload

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1 therefore a “must have” roaming supplier. AT&T is abusing its market power in the
2 “roaming” market to prevent full retail entry and deny any opportunity for disruptive
3 business plans by insurgent small or regional players that want to build nationwide
4 networks and provide nationwide retail services.

5 10. AT&T’s position on contract terms is self-serving and internally
6 inconsistent. When WCX proposes terms that deviate from or have no precedent in AT&T’s
7 existing agreements or plans the proposals are characterized as “outside the scope” of a
8 roaming agreement. **[BEGIN CONFIDENTIAL]** [REDACTED]

9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 **[END CONFIDENTIAL]** In other words AT&T uses two
14 inconsistent arguments to reject elements of WCX’s proposal. The proposal is (i) unique
15 and not found in other AT&T roaming agreements and therefore unacceptable, or (ii) not
16 unique because it is found in one or more of these other agreements but still not applicable
17 to WCX because the provision in the other agreement is for some unexplained reason not
18 suitable for inclusion in the roaming agreement with WCX.

19 11. Some of the terms that do appear in other agreements are said to be
20 not acceptable because the underlying agreement is “strategic” and therefore not “really” a
21 roaming agreement even though the specific provision itself relates to “roaming” terms in
22 the allegedly “strategic” agreement. **[BEGIN HIGHLY CONFIDENTIAL]** [REDACTED]

23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]
29 [REDACTED]
30 **[END**
31 **CONFIDENTIAL]** AT&T’s position appears to be that a provision that does not appear in
32 any other agreement can never be reasonable, but at the same time admittedly reasonable
33 negotiated provisions that do appear in other agreements can never be “compelled” by the
34 Commission. Thanks to the combination of these two reasons for rejection that it applies at
35 its discretion AT&T can always find a justification for excluding any term or condition
proposed by WCX that AT&T does not like.

36 12. Dr. Orszag’s Supplemental Declaration is incorrigibly lopsided in
37 defense of AT&T’s roaming proposal, another indication that this is not a good faith offer.
38 AT&T reserves to itself the right to vary the rates it charges and other conditions applicable
39 to its roaming partners over a very wide and diverse range, based on a plethora of partner-
40 specific circumstances. At the same time Dr. Orszag dismisses some elements in WCX’s
41 roaming proposal that look like AT&T’s other agreements, but then dismisses other

⁸ **[BEGIN HIGHLY CONFIDENTIAL]** [REDACTED] **[END HIGHLY CONFIDENTIAL]**

⁹ **[BEGIN HIGHLY CONFIDENTIAL]** [REDACTED]
[REDACTED] **[END HIGHLY CONFIDENTIAL]**

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elements that have the opposite characteristic, namely they do not look like AT&T's other roaming agreements (Orszag Suppl. Decl. para. 61) or allegedly have unique economic implications (Orszag Suppl. Decl. para. 60). So according to Dr. Orszag it is not legitimate for WCX to introduce its specific circumstances into the formulation of a roaming agreement, even though this is the practice followed by AT&T in its other roaming agreements and it is well established that the reasonableness of any agreement is driven by the "totality of the circumstances" and should be assessed on a "case-by-case" basis.¹⁰

13. AT&T seems to be saying that the Commission cannot ever approve new or different terms and also cannot compel any previously negotiated term or provision AT&T does not want a roaming complainant to have. AT&T's position ultimately reduces to the proposition that the rule-based complaint process cannot result in a roaming agreement that has any individual term, condition or price that AT&T has decided in its complete discretion that it does not want the complainant to have. I do not believe the Commission's purpose or intent was to create a process that could provide no remedy, or a proceeding where the only possible outcome is wholesale adoption of AT&T's unilateral desires regarding a topic (regulated roaming) AT&T fundamentally opposes to begin with.

14. AT&T's proposed roaming agreement presents a restrictive definition of mobile wireless services that identifies these services with specific technologies (GSM/LTE), thereby violating the principle of technology neutrality.¹¹ This principle avoids picking technological winners and defining regulations in technological silos. The value of respecting this principle as far as is possible, limited only by technical standards designed to limit negative externalities such as radio interference and safety, is widely accepted in the telecommunications industry by operators and regulators. Furthermore there is no justification for tying the definition of CMRS (Commercial Mobile Radio Service) to GSM/LTE. "CMRS" comprehends a broad set of different services, spectrum uses and wireless interfaces, and it is purposefully intended to be technologically neutral.

15. AT&T's position in this case is entirely inconsistent with its comments in Docket 15-105.¹² AT&T's initial comments assert on page 2:

Use of LTE-based technology in unlicensed spectrum may offer a cost-effective and spectrally efficient way to help address the skyrocketing demand for mobile broadband, though it cannot take the place of additional licensed spectrum. Through carrier aggregation, LTE unlicensed may allow carriers to gain additional network capacity by combining LTE in unlicensed bands with LTE in licensed bands. In turn, wireless operators will be able to offer consumers seamless user experiences across unified networks. With these important public interest benefits, the Commission should reject calls to prejudice this nascent technology by excluding it from unlicensed bands.

¹⁰ See e.g., *Automatic Roaming Order* ¶30 and rule 20.12(d); *Data Roaming Order* ¶23 and rule 20.12(c)(1).

¹¹ AT&T Best and Final Offer [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL].

¹² AT&T's Docket 15-105 comments are attached as Roetter Supplemental Declaration Exhibit 3.

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Further, to the extent the Commission may consider adopting rules related to LTE use of unlicensed spectrum, it should continue to adhere to its technology-neutral approach to spectrum policy. The Commission has historically remained committed to pursuing technology-neutral regulatory frameworks that treat different technologies equally. This approach has proven successful, allowing diverse technologies to flourish and innovation to thrive. With these successes, there is no reason for the Commission to depart from its past precedent and mandate any form of technical standards that explicitly or implicitly prefer one technology over another.

16. AT&T's position and terms in this proceeding would effectively prevent WCX from deploying LTE-based (or any other wireless interface based) CMRS service using Wi-Fi, Citizens' Band or third party leased network access because **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** under AT&T's terms. If WCX cannot offer roaming to these customers they will not purchase service from WCX, and WCX will not have any incentive to invest, expand or offer competitive services using these technologies.

17. In my expert opinion AT&T's proposals in this regard are not just or reasonable, but are unreasonably discriminatory (because they discriminate against alternative technologies), and are not commercially reasonable. They are not commercially reasonable (with regard to commercial mobile data service) because AT&T has, in fact, refused to offer a data roaming arrangement¹³ for WCX's customers that are primarily served by the alternative technologies but also have mobile stations that are technologically compatible with AT&T's GSM/LTE networks, and can easily be authenticated to roam on AT&T's GSM/LTE networks. AT&T's terms also eliminate any incentive for WCX "invest in facilities and coverage, services, and service quality."¹⁴ They create a barrier to entry.

18. Although WCX has agreed to use provisions from other agreements where possible, WCX has justifiably rejected the proposition that only terms and conditions found in AT&T's existing roaming agreements are applicable to WCX's situation and anything new or not found in another agreement is not acceptable. WCX has the right to propose terms and conditions that are commercially reasonable for its specific situation and are pro-competitive and supportive of innovation, subject to the condition that they deliver reasonable compensation to AT&T and do not burden AT&T's ability to serve its other customers. Under the roaming rules "each case will be decided based on the totality of the circumstances."¹⁵

19. AT&T and Dr. Orszag repeatedly assert that the vast range of terms and conditions that can be found in AT&T's multiple existing roaming agreements are *all* "commercially reasonable" since they have been arrived at as the outcome of arm's length negotiations that produce outcomes that are purportedly or presumptively in the mutual

¹³ Data Roaming Order ¶86, test 2.

¹⁴ *Id.* test 9.

¹⁵ *Id.*

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1 self-interest of both parties. Orszag and Meadors claim that any terms and conditions that
2 fall within this vast range, which includes those offered to WCX, are *ipso facto* commercially
3 reasonable as to WCX (although Meadors then asserts that some of these “commercially
4 reasonable” terms cannot be used if AT&T does not want WCX to have them for some
5 reason). This claim was directly rejected in a recent *Declaratory Ruling*.¹⁶ It also takes no
6 account of market realities and the huge disparity in power and resources between AT&T
7 and the vast majority of its existing roaming partners. Economic theory and empirical
8 experience demonstrate that negotiations under conditions of substantial asymmetry in
9 power and information result in adhesion contracts. These contracts are imbalanced in
10 favor of one party over the other, are not entered into on equal bargaining grounds, and
11 cannot be considered as commercially reasonable with respect to the interests of the
12 weaker party. The outcomes manifest in these contracts are not market-related; they are
13 AT&T-dictated thanks to its market power.¹⁷

14 20. There is no evidence for the implication by Dr. Orszag that unless high
15 roaming rates even well in excess of average retail rates are applied, WCX roamers may
16 potentially harm AT&T by requiring it to make unattractive or even loss making
17 investments in additional capacity to handle their traffic, or will have to meet WCX’s needs
18 at the expense of other users of its network, including AT&T’s own customers (Orszag
19 Suppl. Decl. para. 38). This scaremongering is unjustified. If it were valid the same
20 argument based on the need for additional capacity as the numbers of users increase could
21 be invoked to discourage any additional user of AT&T’s network, including AT&T’s own
22 retail customers. Yet AT&T is continuously trying to attract more customers and retain
23 existing ones. Moreover there is no evidence that the profitability of WCX’s roamers for
24 AT&T at the rates proposed by WCX will be the lowest of any category of usage of its
25 network. There is no justification for discouraging or discriminating against them.

26 21. According to Dr. Orszag WCX is damned if it does and damned if it
27 doesn’t. Dr. Orszag raises the specter of WCX roamers putting a potentially unreasonable
28 burden on AT&T’s network but then forecasts that this roaming traffic will involve such
29 low volumes that WCX should only qualify for the highest price of any rate scheme in which
30 rates decrease with volume.¹⁸ Despite Dr. Orszag’s fervent desires he cannot have it both
31 ways. Volume will either be de minimis and therefore inconsequential in terms of burden,
32 or it will be greater and therefore deserving of volume discounts. **[BEGIN HIGHLY**
33 **CONFIDENTIAL]** [REDACTED]

¹⁶ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Declaratory Ruling, 29 FCC Rcd 15483, 15491, ¶25 (rel. December 18, 2014) (“WTB Declaratory Ruling”).

¹⁷ See Exhibits 4 to 6 in which I refer to the history and future risks of AT&T’s abuses of its market power.

¹⁸ Footnote 59, Orszag Suppl. Decl. - **[BEGIN CONFIDENTIAL]** [REDACTED]

[REDACTED] **[BEGIN HIGHLY**
CONFIDENTIAL] [REDACTED] **[END HIGHLY CONFIDENTIAL]** [REDACTED]
[REDACTED] **[END CONFIDENTIAL]**

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[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] **[END HIGHLY CONFIDENTIAL].**

5 D. AT&T's Effort to Exclude Consideration of "Strategic" Agreements.

6 1. AT&T has introduced a category of so-called "strategic agreements"
7 that AT&T contends are not "really" roaming agreements, and thus provisions similar to
8 those that appear in AT&T's "strategic" agreements should not be "eligible" for use in this
9 proceeding or the WCX roaming agreement, even though those provisions do in fact
10 address roaming. AT&T uses these "strategic" agreements as a tool to circumvent the
11 purpose of the roaming rules and deprive these agreements of any practical significance or
12 use. But these "strategic" agreements have roaming terms, although they also involve other
13 various forms of cooperation, including but not limited to spectrum leases and build-out
14 partnerships.

15 2. AT&T states (Meadors Suppl. Decl. para. 17) that these agreements
16 were not negotiated under the auspices of the "data roaming rules." While I doubt that is
17 factually correct, this claim noticeably omits any disclaimer about whether they were
18 negotiated under the auspices of the automatic roaming rule. According to the AT&T
19 witnesses the roaming terms and conditions in the "strategic" agreements, which include
20 prices that are far more favorable to AT&T's "strategic" partners **[BEGIN HIGHLY**
21 **CONFIDENTIAL]** [REDACTED] **[END HIGHLY CONFIDENTIAL]**
22 than those proposed to WCX, are not relevant in a consideration of commercial
23 reasonableness. This is a creative and ingenious, but nevertheless transparently obvious
24 way to emasculate and circumvent the intent of the roaming rules. In both his original
25 (Orszag Decl. para. 49) and Supplemental Declarations (Orszag Suppl. Decl. paras. 51-54)
26 Dr. Orszag also excludes these so-called Strategic Agreements between AT&T and other
27 operators containing roaming terms and conditions from the auspices of the *Data Roaming*
28 *Order*,²⁰ and denies that they are worthy of consideration in a determination of
29 "commercial reasonableness." In his view AT&T can insert roaming provisions into any
30 agreement it may have or desire to establish with another operator, and if that agreement
31 addresses any topic other than roaming it releases AT&T from the obligation to adhere to
32 the *Data Roaming Order*. Thus not only are the consequences of AT&T's proposed roaming
33 agreement inimical to the long standing goals of public policy and regulation to foster
34 competition and innovation, but AT&T's attitude is that the *Data Roaming Order* can be
35 entirely avoided so that AT&T is free to conduct business at its sole discretion. Acceptance
36 of the argument that the AT&T-defined category of inter-operator "strategic" agreements
37 falls outside the scope and remit of the *Data Roaming Order* would give AT&T free rein to
38 "strategically" exclude any roaming agreement it chooses from review.

¹⁹ **[BEGIN HIGHLY CONFIDENTIAL]** [REDACTED] **[END HIGHLY**
CONFIDENTIAL]

²⁰ **[BEGIN HIGHLY CONFIDENTIAL]** [REDACTED]
[REDACTED] **[END HIGHLY CONFIDENTIAL]**

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3. This tactic has even more “strategic” impact under the Wireless Telecommunications Bureau’s *Declaratory Ruling*. The *WTB Declaratory Ruling* holds:

9. In our view, the data roaming rule was intended to permit consideration of the totality of the facts and therefore to permit a complaining party to adduce evidence in any individual case as to whether proffered roaming rates are substantially in excess of retail rates, international rates, and MVNO/resale rates, as well as a comparison of proffered roaming rates to domestic roaming rates as charged by other providers. As noted below, the probative value of these other rates as reference points will depend on the facts and circumstances of any particular case, including all of the factors set forth in the *Data Roaming Order*, and these other rates should be considered in conjunction with one another rather than in isolation.²¹

AT&T’s effort to shield the “strategic” agreements from consideration is flatly inconsistent with the *WTB Declaratory Ruling* guidance, which clearly holds that the roaming-related terms, conditions and prices in any agreement AT&T may have are relevant and informative, but not determinative. Context is also relevant and informative. AT&T is free to claim, and has claimed, that the more favorable prices in its “strategic” agreements should be given lesser weight than higher prices in “roaming only” agreements because AT&T allegedly received other benefits in return for the lower roaming price. [BEGIN

HIGHLY CONFIDENTIAL]

²¹ 29 FCC Rcd at 15486, ¶9.

[BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]

[BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]

[BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]

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END HIGHLY CONFIDENTIAL

²⁶ [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL]

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4. Orszag Suppl. Decl. para. 34 correctly observes that retail mobile wireless services are typically offered to subscribers in packages that include a bundle of goods (e.g., handsets, tablets) and mobile wireless services (e.g., data, voice, SMS, voicemail, etc.) for a monthly charge, along with usage charges and/or overage charges if a subscriber exceeds the monthly allowance for each service. Dr. Orszag argues that even if one could allocate certain fixed charges to obtain an indicative measure of the effective data rates for retail mobile wireless service, such indicative measures ignore the fact that carriers sell a bundle of complementary goods. He then invokes economic theory, as well as some empirical economic evidence, in an effort to show that prices for complementary goods are inextricably linked (consumers care about what they pay for the bundle - not just what they pay for one component). Dr. Orszag observes that carriers have the incentive to make certain components of the bundle more attractive (e.g., data plans, line access) in order to capture customers and obtain a profit from other components of the bundle, e.g. handset insurance, cloud service etc., although it is possible to find examples of data-only offerings that are completely unbundled. He also implies that operators benefit from the fact that customers often underestimate or do not anticipate accurately the volume of their usage. Thus even if they buy a package for say 10GB of data they may only use 5 GB so the costs incurred by the operator for delivering what the customer has paid for are lower and the actual revenue per GB delivered is higher than the advertised rate.²⁷

5. However Dr. Orszag fails to draw any definitive conclusions from these wide-ranging but largely correct observations or present a quantified link to the parties' specific price proposals. And several questions remain to be answered. For example, he never asserts that the cost to AT&T of handling roaming data generated by WCX's customers would be greater than the retail rates per GB for stand alone mobile data packages that today (see Appendix A) are in many cases well below the roaming rates proposed [BEGIN CONFIDENTIAL] [REDACTED]

Apparently neither he nor AT&T have an accurate idea of what AT&T's costs to handle the incremental traffic generated by WCX's roamers will be. Or perhaps they do and failed to disclose because it would damage their case. Dr. Orszag presents a lot of premises but ends by throwing up his hands and then basically arguing that because there is a plethora of retail prices that cover a very wide range **any** figure that AT&T picks within this wide range is presumptively a "commercially reasonable" offer for WCX. But his argument could equally be applied to WCX's price, because his empirical data and premises would support WCX's prices since they too are within the publicly known wide range of retail prices.

6. Dr. Orszag pays no attention to whether the roaming data price proposed by AT&T will or will not make WCX's business model unviable however efficient, ingenious and innovative its operations and the quality of the services, applications and

²⁷ There is a movement to mitigate this situation for customers by allowing them to rollover their unused data allowance at least to the next billing period, see Exhibits 7 and 8 (AT&TRolloverData and T-MobileSimpleChoice DataStash).

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1 care WCX provides to its customers. One could almost conclude from Dr. Orszag's
2 presentation that the higher the price the better off society is, even though society will
3 ultimately be the ones that bear those prices. Dr. Orszag is wholly unconcerned about
4 whether the wholesale price that has to be paid by WCX is substantially in excess of the
5 retail price it can charge to be competitive, and nowhere does his "commercially
6 reasonable" analysis even touch on that subject. But at some point it is obviously true that -
7 applying one of the *Data Roaming Order* tests - an astronomical price that renders roaming
8 infeasible is tantamount to a refusal to offer roaming at all. Orszag entirely fails to help the
9 Commission figure out the sweet spot zone for roaming price reasonableness that stands in
10 between unreasonably low and unreasonably high; one that supports the policy of
11 seamless nationwide connectivity for consumers but also supports the goal of incenting
12 more infrastructure deployment by many facilities-based providers.

13 7. WCX is offering roaming rates per GB of **[BEGIN CONFIDENTIAL]**
14 **[REDACTED]** **[END**
15 **CONFIDENTIAL]**. Furthermore the cost per GB that AT&T (and other operators) incur is
16 already no more than \$10/GB and probably lower, and will continue to fall substantially
17 over the next few years as a consequence of technological improvements and increased
18 utilization (see Appendix A). The roaming rates proposed by WCX are thus commercially
19 reasonable and even generous. In contrast the rate proposed by AT&T of **[BEGIN**
20 **CONFIDENTIAL]** **[REDACTED]** **[END CONFIDENTIAL]** is extortionate and will inevitably entail
21 losses for WCX when its customers roam. **[BEGIN HIGHLY CONFIDENTIAL]** **[REDACTED]**
22 **[REDACTED]**
23 **[REDACTED]**
24 **[REDACTED]**
25 **[REDACTED]** **[END HIGHLY CONFIDENTIAL]**.

27 8. The record of AT&T's roaming agreements analyzed by Dr. Orszag
28 includes multiple examples of rates **[BEGIN CONFIDENTIAL]** **[REDACTED]**
29 **[REDACTED]**
30 **[REDACTED]**
31 **[REDACTED]** **[END**
32 **CONFIDENTIAL]** **[BEGIN HIGHLY CONFIDENTIAL]** **[REDACTED]**
33 **[REDACTED]**
34 **[REDACTED]**
35 **[REDACTED]**
36 **[REDACTED]**
37 **[REDACTED]** **[END HIGHLY CONFIDENTIAL]**

²⁸ Reply Declaration of Lowell Feldman, November 21, 2014, at 7, 80.

²⁹ **[BEGIN HIGHLY CONFIDENTIAL]** **[REDACTED]**
[REDACTED] **[END HIGHLY CONFIDENTIAL]**

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1 9. The Commission has repeatedly recognized that the market for
2 mobile services is national in scope. In order to be competitive an operator has to offer
3 services to its retail customers with national coverage and no explicit additional charges for
4 roaming. Under these conditions it is obvious that if an operator has to pay wholesale
5 roaming rates that exceed the retail rates it can charge its customers and remain
6 competitive then no matter how efficient its operations the operator will lose money on its
7 customers whenever they roam. The smaller the operator is in terms of its own network
8 coverage or population covered then the more money relative to its total revenues it will
9 likely lose under these conditions because customers will spend more time and incur a
10 greater proportion of their usage as roamers than do customers of operators with much
11 more extensive network coverage.

12 10. The FCC has taken care to ensure that small operators can obtain
13 spectrum on a licensed, light-licensed and unlicensed basis. Often (but not always) there
14 are build out requirements and other obligations. These smaller operators have invested
15 and have a reasonable good faith expectation that they will be able to develop a viable
16 business model. But *they cannot attract the investment they need or continue to build out*
17 *their own networks unless they have access to roaming services that among other conditions*
18 *do not oblige them to lose money when their customers roam, thereby rendering any business*
19 *model they can develop entirely unviable.* It simply cannot be “reasonable” or “commercially
20 reasonable” for roaming prices paid by these operators to be so destructively high that the
21 essential roaming arrangement necessary to provide service will inevitably destroy the
22 viability of their business models no matter how well planned and executed. Roaming rates
23 that violate this necessary condition, as AT&T persists in proffering despite the reductions
24 in its “best and final” compared to earlier offers (AT&T Best and Final Offer, July 15, 2015),
25 is another demonstration that it is not truly seeking a “market-oriented” result that would
26 obtain between two entities negotiating in good faith for a set of terms, conditions and
27 prices that meet the needs for both sides. AT&T is certainly aware of the damaging and
28 unavoidably fatal consequences of its proposed roaming rates for WCX.

29 11. Dr. Orszag devotes one section of his Supplemental Declaration to
30 calculating the effective retail data rates in AT&T’s data plans including its line access
31 charge and taking account of the extent to which customers fail to use their full data
32 allowance or have to pay data overages (Orszag Suppl. Decl. paras. 41-43 and Table B-5).
33 But since the use of AT&T’s network by roamers does not involve an AT&T retail “access
34 line” it makes no sense to include this charge in the calculation. Moreover Dr. Orszag has
35 ignored the plans offered by Cricket, acquired by AT&T in Q1 2014, that include all taxes
36 and fees and offer data allowances of 2.5 up to 10 GB per month (plus unlimited domestic
37 text and calls domestically as well as to Mexico and Canada (excluding the Northwest
38 Territories)).³⁰ He also ignores other operators’ data-only plans that include examples of
39 rates from below \$10/GB to \$20/GB (see Appendix A for examples, including Cricket). Once
40 more Dr. Orszag’s implicit assumption is that what AT&T does and how it behaves is the
41 only acceptable standard against which “commercial reasonableness” or market conditions
42 should be assessed, to the exclusion of the broader market context and innovations that
43 may be introduced by other players. **[BEGIN CONFIDENTIAL]**

³⁰ See Exhibit 9: Cricketprepaid.

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[END CONFIDENTIAL].

12. Dr. Orszag reviews international roaming rates (Orszag Suppl. Decl. paras. 44-45 and Table B-6) and also emphasizes their wide range. He does not however identify which of the foreign operators involved recover the wholesale costs they incur (with huge margins) when their customers roam onto AT&T's network in the US through specific roaming charges they levy on their customers. To take one example, Vodafone UK's retail charges lie between £200-3,000/GB (about \$310-4,650) for UK roamers in the US, although they can instead apply their UK data allowance (up to 0.5 GB) in the US for a charge of £5/day³² (about \$7.80). A situation in which an operator recovers its wholesale roaming costs through additional retail charges to its customers is not remotely comparable to that faced by a small US operator within the US that cannot do so.³³ From the perspective of US customers the recent advent of North American plans that offer a fixed price that covers Mexico and Canada as well as the US³⁴ is a welcome step in the right direction that depends for its viability on the establishment of inter-operator international roaming rates that do not entail significant losses for the serving provider.

Dr. Orszag also analyzes the rates paid in resale agreements (Orszag Suppl. Decl. paras. 46-48). He once again emphasizes their complexity and variety. While these discussions may be informative they are irrelevant to WCX's situation. WCX is neither an MVNO nor any other type of reseller in the context of its use of AT&T's mobile services. There are several clear distinctions between resale and roaming in the CMRS context. In this context resale refers to MVNOs (Mobile Virtual Network Operators). MVNOs are wireless companies that have their own brand, marketing, retail outlets, and mobile device offerings, but use another operator's infrastructure (base stations and network) instead of building and operating their own. MVNOs buy capacity (e.g. minutes of voice, volumes of data) from an underlying carrier at wholesale prices and then sell them at retail. MVNOs come in several flavors. For example some have their own reasonably comprehensive OSS/BSS (Operational Support Systems/Business Support Systems) whereas others rely to a significant or large extent on the underlying carrier or a third party (e.g. an MVNE or Mobile Virtual Network Enabler) for these necessary functions.

Roaming is distinctively different from resale along both technical and economic dimensions. In the GSM/UMTS/LTE world the difference between roaming and resale in terms of devices lies in the provision of the SIM card. Customers of a roaming or serving provider have to acquire this provider's specific SIM card, which identifies it as the customer's network service provider. To use the customer's device on a host provider's roaming network it has to be compatible with the technology or one of the technologies (air interface, frequency(ies)) of the host's network. In contrast customers of an MVNO

³¹ Orszag Suppl. Decl. para. 43.

³² See Exhibits 10 and 11 (VodafoneDataTraveller and VodafoneWorldTraveller).

³³ This situation has led to instances and awareness of "bill shock", see Exhibit 12: Roaming without a phone bill shock.

³⁴ See Exhibit 13: T-MobileMexicoCanadaU.S.

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1 require a SIM card that identifies the MVNO's underlying carrier as the network service
2 provider. In the CDMA world there is no SIM card that is user-accessible as well as in many
3 cases transferable from one device to another. Instead subscriber information is stored in
4 the device. CDMA devices that roam use a database that contains information about the
5 roaming services available when the customer is outside the home network so that the
6 device can access them.

7
8 Another significant difference between roaming and resale is that in the latter the
9 underlying carrier provides switching and connectivity to other networks and the public
10 Internet for the MVNO's customers, whereas in roaming the host carrier's role is more
11 limited. It provides authentication of the roamer on its network and then transmission or
12 connectivity to the roamer's home network.³⁵

13
14 The technical and operational differences between resale and roaming have corresponding
15 economic or cost implications for the underlying carrier and host provider. The costs are
16 different because the requisite functionality to deliver retail services to end-users is
17 distributed differently between the parties.

18
19 Retail services involve the greatest functionality and hence incur the highest costs for an
20 operator. MVNOs exploit more functionality from the underlying carrier than is required by
21 a home or serving provider from a host or visited network for their roamers. Hence for a
22 carrier the cost basis for delivering retail services is higher than that for serving its
23 wholesale MVNO customers that in turn is higher than that for accommodating its roaming
24 partners. Yet in terms of prices the order is reversed in practice. Roaming prices are higher
25 than retail prices, and exceed MVNO or resale prices by even greater amounts. The latter
26 (retail and MVNO) are more competitive markets than roaming, i.e. the buyers have more
27 choices of supplier compared to an operator that is looking for national roaming providers.
28 Retail and resale are also unregulated markets whereas roaming is regulated as a
29 substitute for competition. However, although roaming is in theory compelled, its high
30 prices compared to its costs indicate that regulation is not working as a substitute for
31 competition.

32
33 There is a legitimate concern that an operator may use roaming as an alternative to
34 investment in its own facilities where it can do so (which requires access to spectrum) if
35 the prices of roaming are low enough in comparison to the total costs (capital and
36 operating expenses) of deploying and operating these facilities. Consequently facilities-
37 based competition would be lower than it would and arguably otherwise should be. In
38 order to mitigate this risk it may be argued that the margin³⁶ for roaming should be higher
39 than for retail or resale services in order to find a sweet spot for roaming prices that is a
40 "right" amount above cost so as to encourage seamless national connectivity for all

³⁵ It is also possible in principle to have local breakout (LBO), a mechanism whereby roaming traffic is not routed back to the home network but is handled by the host carrier. In this case the functionality provided by the host carrier is greater. However this is not the architecture of WCX's roaming arrangement nor to my knowledge has LBO been implemented to any significant extent.

³⁶ Note that I say "margin" – the increment over attributable costs – rather than price. I do not agree that the price for roaming should be higher than retail or resale.

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1 customers of all operators but not discourage investment by operators that are inescapably
2 dependent on roaming.

3
4 This “right” price must also satisfy two conditions, namely that it should: (i) Allow host
5 providers to cover their costs to provide roaming with a reasonable margin (which will
6 certainly be the case for prices comparable to retail) while (ii) Not making it impossible for
7 serving providers to compete at the retail level no matter how efficient or innovative they
8 are in the operation of their own facilities and services. A roaming price that exceeds retail
9 market prices violates condition (ii), while one that is comparable to or somewhat below
10 this level should satisfy both of these conditions, according to the best available
11 information on the costs of providing mobile services than can be gleaned from the analysis
12 of retail prices and the costs incurred by mobile businesses as presented in Appendix A.

13
14 13. WCX is an operator requesting roaming connectivity so that it can
15 provide access to its own services to its customers when they roam outside its coverage
16 area. WCX has contended from the beginning that its proposal is for roaming, not resale.
17 But it is significant that wholesale resale prices are generally lower than retail prices, and
18 even lower than roaming. WCX’s price proposal – while less than AT&T’s – is higher than
19 Dr. Orszag’s resale data only price, and fits comfortably within his calculations once you
20 look at only the comparable and relevant components.³⁷

21 C. AT&T’s terms are not either “market based” or consistent with the
22 Commission’s roaming rules and policies.

23 1. A recurring assertion throughout Dr. Orszag’s Supplemental
24 Declaration is that the terms and conditions of all the roaming agreements AT&T has
25 signed are market-based and hence commercially reasonable (Orszag Suppl. Decl. Section
26 IV, *AT&T’s Proposed Roaming Terms and Conditions Are Market Based and Consistent with*
27 *the Commission’s Data Roaming Order*.) This oft repeated characterization of these
28 agreements is unjustified in light of the much greater market power and resources of AT&T
29 compared to the overwhelming majority of the US operators with which it has established
30 roaming relationships. Economics and the observed behavior of individuals and
31 organizations show that vast asymmetries in power and information such as are evident in
32 the establishment of roaming agreements between AT&T and much smaller operators lead
33 to adhesion contracts. These contracts are imbalanced in favor of one party over the other,
34 and are not entered into on equal bargaining grounds. They do not, in fact, represent a truly
35 “market-based” result that would be reached between two entities that truly want to have a
36 relationship but equally bargain to achieve their respective needs and goals.

37 2. There is now, however, an example of what a truly market-based
38 roaming agreement would look like. **[BEGIN HIGHLY CONFIDENTIAL]** [REDACTED]
[REDACTED]
[REDACTED]

³⁷ Roaming does not involve use of an AT&T SIM card. There is no basis for a fixed monthly per-user charge. Dr. Orszag’s efforts to claim those elements are comparable fall very short. WCX will be aggregating all usage. I understand that if AT&T had tried to obtain a minimum usage guarantee WCX would have been willing to negotiate over reasonable terms, but AT&T never broached that topic.

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ferred, confidential and prices represent a far better indicator of what a truly

[END HIGHLY CONFIDENTIAL]

17 3. The roaming rules were promulgated to ensure effective competition
18 in the US mobile market for the sake of customers and innovation, by among other things,
19 protecting the ability of small geographically limited mobile operators to expand their
20 coverage footprints beyond just the geographic areas associated with the fully regulated
21 licenses awarded to them. The roaming rules were designed to remove an otherwise
22 insurmountable obstacle (confinement to providing service only within a limited licensed
23 spectrum area) to these operators' access to and participation in a nationwide market. The
24 rules were supposed to achieve a balance and backstop to redress harmful imbalances in
25 roaming negotiations that involve relationships between operators with vastly disparate
26 market power and resources, so that the interests of the weaker as well as of the much
27 larger party are equally respected. AT&T's two core arguments are designed to nullify the
28 purpose of this Order and emasculate its application in practice.

29 4. Contrary to the whole idea of a good faith negotiation in which the
30 interests of both parties are respected and seen to be respected AT&T and Dr. Orszag
31 assert that AT&T can unilaterally and at its sole discretion decide and define what is
32 acceptable in the market and from a regulatory perspective and conversely what is not
33 acceptable, by claiming that:

34 a. The adhesion contracts that AT&T has established with its
35 captive roaming partners are all the outcome of arm's length commercial negotiations and
36 hence are all presumptively reasonable, except that if AT&T has decided it does not like a
37 previously accepted provision then it is not reasonable; and

38 b. AT&T is free at its discretion to establish contracts with other
39 operators that contain more than just roaming terms and conditions, thereby excluding
40 them from the auspices and jurisdiction of the roaming rules.

41 c. AT&T, and only AT&T, gets to define each and every detail, and
42 entirely control what "reasonable" and "commercially reasonable" mean from a
43 contractual, operational and market perspective in the abstract and in each and every

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1 concrete situation. No other party, and no other existing contracts between other players
2 count or can be considered. Even the Commission has no real ability to impose specific
3 terms over AT&T's objections.

4 Ultimately, the complaint process is meaningless since according to AT&T the Commission
5 must accept AT&T's position, and reject all other arguments, with regard to every aspect of
6 a roaming agreement reached through the complaint process. If AT&T likes a provision it
7 must be used; if AT&T does not like a provision – even one previously agreed to by AT&T –
8 then the Commission cannot “compel” AT&T to accept that provision.

Conclusion

10 The unmistakable consequence of the terms and conditions included in AT&T's proposed
11 roaming agreement would be to prevent WCX's entry into the US mobile market no matter
12 how efficient its operations, or how innovative and attractive the services and applications
13 it makes available to its customers may be. AT&T's terms provide powerful *disincentives* for
14 WCX to expand its own network coverage through means other than compelled roaming on
15 AT&T's network. It is unclear whether this foreseeable outcome represents AT&T's intent –
16 to prevent market entry and to inhibit or suppress innovations that do not meet its own
17 restrictive definitions of what is acceptable – or if AT&T itself and Dr. Orszag are blind to
18 the lethal impact of the terms and conditions of AT&T's roaming proposal on the viability of
19 WCX as a mobile operator.

20 In addition the arguments put forward in the Meadors and Orszag Supplemental
21 Declarations in objection to the WCX roaming proposal are internally inconsistent. They
22 rely on an inconsistent menu of objections applied on a case-by-case basis so as to give
23 AT&T a reason to reject anything it does not like, e.g. one roaming condition is not
24 acceptable even if it can be found within the range of conditions in AT&T's existing roaming
25 agreements, while another is not acceptable because there is no precedent for it.
26 Furthermore AT&T's claims and arguments rely on some unilateral definitions and
27 assumptions that are at best not justified by regulatory or public policy and at worst violate
28 them. They effectively block the ability of WCX to compete and deny its right to exploit
29 innovations that do not fall within an unreasonably restrictive AT&T-defined realm of
30 acceptability, even if they are recognized practices by the mobile industry including AT&T
31 itself.

32 The conclusion that AT&T's roaming proposal does not lie in the self-interest of WCX
33 invalidates the application of the assertion by Dr. Orszag in his original Declaration (Orszag
34 Decl. para. 48) that, “*Economics shows that arm's length agreements meet a standard that*
35 *both parties found to be in their mutual self-interest, and the Commission has adopted such a*
36 *standard for commercial reasonableness.*” If AT&T's proposal is not in the interest of WCX
37 then by definition it cannot meet the standards for reasonableness (for automatic roaming)
38 or “commercial reasonableness” (for commercial mobile data service roaming).

39 In contrast WCX's proposal offers compensation to AT&T that more than covers reasonable
40 estimates of the costs incurred by AT&T in providing the connectivity sought by WCX for its
41 customers when roaming on AT&T's network and is commercially reasonable for both
42 parties in all its other aspects.

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1 Finally, WCX's proposal is fully consistent with the policies and goals behind the
2 Commission's roaming rules. WCX has the ability to support nationwide seamless
3 connectivity for its users, but also has every incentive to invest in and construct its own
4 mobile broadband infrastructure and expand its coverage, which in turn would reduce
5 WCX's need to use AT&T's network for roaming. WCX can innovate and compete while not
6 unduly using AT&T's network or imposing unreasonable burdens on AT&T.
7

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1

2 *Appendix A: Mobile Data Rates and Costs*

3 In recent years and even during the first half of 2015 there have been substantial changes
4 in mobile retail and roaming data rates, notably in the context of the relatively new need
5 for LTE roaming and the emerging growth of M2M applications. In order to avoid
6 objections to or lack of clarity about the use of retail mobile data prices calculated when
7 they are part of a bundle of services that may include equipment, voice and text services,
8 and ancillary elements such as cloud services the following examples are taken either from
9 strictly data-only plans, or the full price of the bundled service is allocated to mobile data
10 thereby ensuring that if anything the reasonable retail price of mobile data is exaggerated.
11 Line access charges are excluded, since they are not relevant for roamers.

12 **Simple Mobile**³⁸ offers data plans³⁹ in which the retail price for data varies from about
13 \$13/GB to \$5.5/GB for services including unlimited domestic talk and texting and
14 unlimited international texting. As noted the calculation of these data prices allocates the
15 full price of the bundle of services to data. Furthermore they involve BYOD (Bring Your
16 Own Device) arrangements in which the customer is able to use his or her unlocked device.
17 Simple Mobile does not charge an access fee.

18 **Straight Talk**, an MVNO owned by America Movil that uses the AT&T network among
19 others, offers a service that bundles unlimited calls and texts with 5GB of high speed data
20 for \$45/month, i.e. a retail price of \$9/GB if the entire price is assigned to the data
21 element.⁴⁰

22 **AT&T's Data-Only Plans** for data-only devices include retail prices for monthly volumes of
23 both 3 and 5 GB of \$10/GB and overage fees at the same level,⁴¹ while its **Mobile Share**
24 **Value Plan**⁴² – including rollover of unused data (only for one month) – offers prices
25 ranging from \$25/GB for 1 GB to \$7.50/GB for 50 GB of shared data. The latter plans also
26 include unlimited domestic talk and texting and 50 GB of cloud storage. Again the full price
27 of the plan is allocated to the data service within the bundle of services the plan provides.

28 **Cricket (now owned by AT&T)** offers plans⁴³ that include from 2.5 GB to 10 GB of
29 monthly data plus unlimited calls and texts within the US and for plans with 5GB or more
30 from the US to Mexico and Canada (excluding the Northwest Territories) for between \$16-
31 \$6/GB respectively. These prices are the full price for the services including all taxes and
32 fees.

33 **Verizon's data-only pricing**⁴⁴ ranges from \$5.6-\$6.7/GB for monthly shared data volumes
34 of 16-6 GB respectively.

³⁸ Simple Mobile is an MVNO (originally a T-Mobile MVNO) that was acquired by America Movil in 2012.

³⁹ See attached Exhibit 14: Simple Mobile Service Plan.

⁴⁰ See attached Exhibit 15: StraightTalkServicePlan.

⁴¹ See attached Exhibit 16: AT&TDataPlans.

⁴² See attached Exhibit 17: AT&TMobileShared Value.

⁴³ See Exhibit 9: CricketPrePaid.

⁴⁴ See Exhibit 18: VerizonMore Everything.

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1 **T-Mobile's** Simply Prepaid™ service⁴⁵ offers unlimited calling, text and data with 3 or 5GB
2 of LTE data (if these volumes are exceeded speed is throttled to the rates available on 3G)
3 for \$16.67 and \$12/GB respectively, again allocating the entire price to the LTE data.

4 **Sprint's** AllIn price is \$80/month⁴⁶ for unlimited calls, texts, and high -speed data while on
5 the Sprint network (with a limit on the amount of roaming minutes and data). This price
6 includes a \$20 per month payment for the smartphone and there is no additional "line
7 access" charge such as AT&T imposes. Sprint's Family Share Pack Plan⁴⁷ offers include
8 10GB of shared data for \$100/month and 40 GB of data for \$120/month (i.e. \$10/GB and
9 \$3/GB assigning zero cost to the other components of the bundle). There are no access
10 charges if the customers bring their own devices.

11
12 Dr. Orszag argues correctly (Orszag Suppl. Decl. para. 34) in his analysis of the retail prices
13 of mobile data that, *"carriers have the incentive to make certain components of the bundle*
14 *more attractive (e.g., data plans, line access) in order to capture customers and obtain a*
15 *profit from other components of the bundle (e.g., handset insurance, cloud service, etc.)."*
16 However it would be nonsensical to suggest that the prices cited above are distorted or
17 biased in the fashion indicated by Dr. Orszag below what a price would be that is calculated
18 to deliver a reasonable margin on mobile data transmission. They are either stand-alone
19 prices, or they present an inflated value of the retail price for mobile data, since the entire
20 price of a bundle that includes other valuable services is attributed to its data component.
21 Therefore it is reasonable or even generous to consider that a "reasonable" wholesale
22 roaming rate for LTE "data"⁴⁸ providing an acceptable margin for the host provider might
23 be calculated on the basis of the upper range of the retail prices cited (i.e. \$15-20/GB)
24 minus a discount since some costs incurred to serve retail customers do not apply in the
25 wholesale arena.

26 The other side of the financial coin for operators to the revenues they receive as host
27 providers are their costs to deliver roaming traffic, as discussed below.

28 Costs

29 AT&T does not discuss the issue of the costs it will incur to provide roaming services to
30 WCX. I have no direct information concerning the mobile broadband data costs that AT&T
31 will incur in this situation.

32 There is no useful publicly available information on the details of the costs AT&T incurs in
33 its network that should be allocated to mobile data transport. Nevertheless presumably
34 AT&T would consider that if these costs are greater than the revenues it will receive based
35 on the roaming rates proposed by WCX then these rates should be viewed as "commercially
36 unreasonable" in the context of self- interest. Equally if WCX's proposed rates will generate

⁴⁵ See Exhibit 19: T-MobilePrepaidPhones.

⁴⁶ See Exhibit 20: SprintAll_In.

⁴⁷ See Exhibit 21: SprintDataPlans.

⁴⁸ LTE "data" can be "interconnected data" or non-interconnected "commercial mobile data." Indeed with LTE even though the traffic looks like "data" it could be VoLTE "voice." My observations here do not imply that only the commercial mobile data standard applies.

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1 a reasonable margin for AT&T's provision of roaming services then financially they should
2 be viewed as "commercially reasonable."

3 There is nonetheless some evidence about AT&T's likely costs to deliver mobile broadband
4 data given its scale, number of subscribers, and utilization. This evidence supports the
5 conclusion that these costs are today well below \$10/GB and may soon reach the \$1-\$2/GB
6 range.

7 The costs to carry mobile data traffic vary significantly, as Dr. Orszag points out, by
8 geography or area (urban, suburban, rural) and are also influenced by other factors
9 (Orszag Suppl. Decl. para. 38). The network costs (capital expenditure (capex) plus
10 operating expenses (opex)) per subscriber, and hence these costs per GB of data delivered
11 are relatively high when the subscriber density is low, and decrease as the costs are shared
12 among more subscribers. A Nokia White Paper⁴⁹ presents a range of scenarios for these
13 costs. It concludes that if total data use is high, either due to a high number of subscribers
14 or to high usage per subscriber, the cost per GB can be as low as \$1, for example with 40%
15 mobile broadband penetration and usage of 2 GB/subscriber/month. Coincidentally one
16 source has found that in Q1 2015 the average cellular data usage of US mobile broadband
17 subscribers was 2.5 GB.⁵⁰ I do not know exactly the average usage of AT&T's mobile
18 customers, although Dr. Orszag notes **[BEGIN CONFIDENTIAL]** [REDACTED]

[END CONFIDENTIAL].

23 A more recent White Paper from Nokia calculates the evolution of the Total Cost of
24 Ownership of mobile broadband networks over the period from 2010 to 2020 taking
25 account of the new and improved technologies already and soon to be deployed – see
26 following chart. It presents a picture of TCO falling well below \$11/GB and decreasing over
27 the next few years to the \$1 range (1 € = \$1.10).

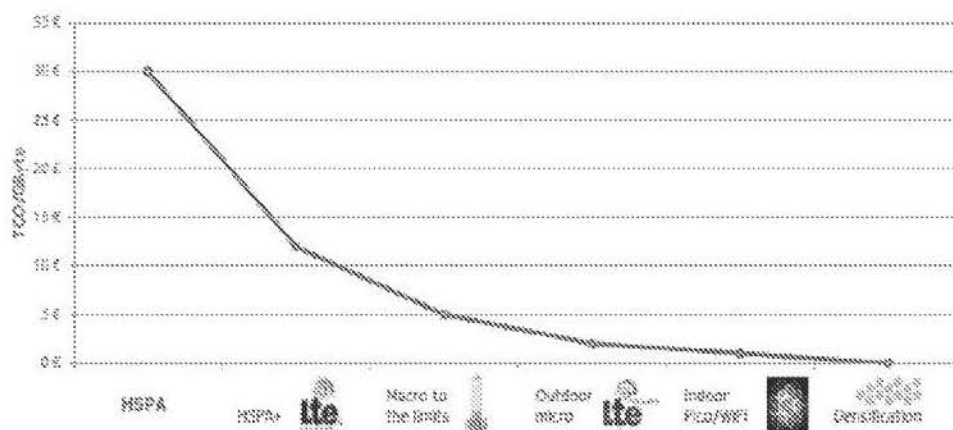
Total Cost of Ownership⁵¹

⁴⁹ See attached Exhibit 22: Nokia White Paper (2011), "Mobile broadband with HSPA and LTE – capacity and cost aspects."

⁵⁰ See attached Exhibit 23: USCellularDataUsage.

⁵¹ See attached Exhibit 24: Nokia White Paper, "Deployment Strategies for Heterogeneous Networks."

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1 In an older study in 2009 Ericsson produced a White Paper⁵² that predicted the network
2 costs of mobile broadband data (including capital expenditure and operating expenses) at
3 between \$1-2/GB depending on the area (urban, suburban, rural) and the network
4 utilization as well as factors such as whether an operator can reuse existing infrastructure
5 to deploy new mobile broadband systems.

6 The total costs of a mobile operator to provide service to its retail customers include more
7 than the costs of the network itself. They also include the costs of marketing, billing,
8 equipment subsidies⁵³ (unless customers pay the full price or bring their own device),
9 customer care, and others. The total costs incurred by an operator in serving a wholesale
10 customer are significantly lower, even though partially offset by some non-network costs of
11 supporting the former, than for a retail customer, as I showed in my earlier Declaration
12 (Roetter Decl. p. 20). Hence if mobile operators can achieve acceptable margins over their
13 costs to serve retail customers at the level of retail data prices illustrated above, wholesale
14 roaming rates that are significantly lower than these retail prices should enable them to
15 achieve comparable margins from the roaming traffic they carry.

16 In summary, the combination of an analysis of current retail prices for mobile data (as of
17 July 2015) services and publicly available information on network costs indicates
18 conservatively that data roaming rates significantly lower than the \$15-20 range/GB
19 should be "commercially reasonable" when paid to AT&T as a Host provider, while
20 comparable or higher rates are *a fortiori* even more reasonable or generous.

21

⁵² See Exhibit 25: Ericsson Business Case.

⁵³ These subsidies are typically recovered over time (and more) within the monthly prices charged for service although often even when they have been fully recovered with a margin the monthly cost of the service is not necessarily reduced accordingly.

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- 1 Appendix B: Additional Regulatory Filings by Roetter Since Last Declaration
- 2 Docket: 05-265 – Reexamination of Roaming Obligations of Commercial Mobile Radio Service
- 3 Providers -
- 4 <http://apps.fcc.gov/ecfs/document/view?id=60001047356>
- 5
- 6 Docket 14-28 – Protecting and Promoting the Open Internet-
- 7 <http://apps.fcc.gov/ecfs/document/view?id=60001112190>
- 8 <http://apps.fcc.gov/ecfs/document/view?id=60001044394>
- 9 <http://apps.fcc.gov/ecfs/document/view?id=60001046436>
- 10 <http://apps.fcc.gov/ecfs/document/view?id=60001012303>
- 11 <http://apps.fcc.gov/ecfs/document/view?id=60001011858>
- 12 <http://apps.fcc.gov/ecfs/document/view?id=60001010897>
- 13 <http://apps.fcc.gov/ecfs/document/view?id=60001008598>
- 14 <http://apps.fcc.gov/ecfs/document/view?id=60001009570>
- 15

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- 1 This concludes my Supplemental Declaration. I reserve the right to amend the
2 Declaration as circumstances may require or permit, and also reserve the right to reply to
3 any oppositional contentions that AT&T Mobility.

A handwritten signature in black ink, appearing to read "Martyn Roetter", is positioned above a horizontal line.

Martyn Roetter